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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOHNS-MANVILLE CORPORATION and
JOHNS-MANVILLE SALES CORPORATION,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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The petition and the amici briefs demonstrate that this case presents an important and frequently recurring question on the proper scope of Claims Court jurisdiction as limited by 28 U.S.C. § 1500. In response, the government does not question the vital importance of the proper resolution of the issue to the efficient administration of justice.

Equally as important, the government makes scant effort to defend the decision of the court of appeals on its stated terms. Instead, the government proposes an entirely new jurisdictional formulation, which it regards as "more accurate" than the one adopted by the court of appeals. The lengths to which the government goes to rationalize the Federal Circuit's decision—by relying on

a formulation neither used nor even proposed below—only underscores the need for this Court to step in to stem the uncertainty surrounding the proper interpretation of Section 1500.

1. The government's submission proposes a creative rewriting of Section 1500. The express statutory language bars Claims Court jurisdiction only where the plaintiff has a suit for the same "claim" pending in another court. Ignoring the word "claim," the government's analysis proceeds as if Section 1500 used the term "controversy" instead. *See, e.g.*, Br. in Opp. 16 ("[the] purpose [of 28 U.S.C. § 1500] was to ensure that an action against the United States *with respect to a particular controversy* be confined to a single forum") (emphasis added); *id.* at 18 ("pieces of what the [lower courts] correctly saw as *one major controversy*") (emphasis added); *id.* at 19 ("collateral estoppel or even claim preclusive effect in other actions *involving the same controversy*") (emphasis added). The simple answer to the government's contention is that Congress did not write the statute that way.

Both petitioners' *World War II* Claims Court suit for contract-based damages under the Tucker Act (covering injuries to hundreds of shipyard workers during the World War II time period) and petitioners' *Robinson* district court action for tort-based damages under the Federal Tort Claims Act (covering injuries to John Robinson in the 1960s) raise some convergent questions of the government's responsibility for different asbestos-related injuries. On that basis, the government seeks to categorize all asbestos-related claims as a single "controversy" and, having rewritten the statute more broadly and less definitely than Congress, the government then races to lock the doors to the Claims Court. But, as this Court has observed, a single "controversy" often can generate different claims arising in different jurisdictions, involving parallel grounds for recovery, and requiring different elements of proof. *See United Mine*

Workers v. Gibbs, 383 U.S. 715, 726-27 (1966). In short, a "controversy" is not a "claim." [1]

2. The government also engages in creative revision of the Federal Circuit opinion, presumably to add a patina of support for propositions that are otherwise insupportable. The express and central analytical tool in the court of appeals opinion is the "operative facts" test. Shying away from that formulation, the government instead suggests (Br. in Opp. 18 n.20) that "the term 'operative facts' . . . is perhaps more accurately expressed by the term 'common nucleus of operative fact' used by this Court in another context in *United Mine Workers v. Gibbs*."

The government's contention is multiply flawed. First, the court of appeals did not adopt the "more accurate" terminology which the government now prefers, but which it never proposed below. Second, the concept of a "common nucleus of operative fact" is not necessarily the same as the concept of a "claim" and, hence, is not the terminology Congress selected in enacting and recodifying Section 1500.

The government's citation of *Gibbs* is particularly telling. In weighing whether a federal court may exercise discretionary jurisdiction over pendent state law claims derived from "a common nucleus of operative fact" (383 U.S. at 725), this Court proceeded in *Gibbs* from the common ground that the state claims and the federal claims were *not* the same "claim." Rather, the Court

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[1] The government's argument directly contradicts its attempt to harmonize the conflicting case law interpreting Section 1500. If any case involved a single controversy and involved identical "operative facts" it was *Casman v. United States*, 135 Ct. Cl. 647, 650 (1956) (plaintiff sought damages in the Claims Court and reinstatement in the district court based on precisely the same contentions). Yet in *Casman* each suit was properly held to involve a different "claim." *See also Prillman v. United States*, 220 Ct. Cl. 677, 679 (1979) (plaintiff sought money damages less than $10,000 and reinstatement in district court and money damages in excess of $10,000 in Court of Claims based on identical facts and issues).

recognized that although the claims differed, they comprised "but one constitutional 'case'" and plaintiffs "would ordinarily be expected to try [all claims] in one judicial proceeding." *Ibid.*[2]

In *Gibbs*, this Court defined a "claim" or "cause of action" by reference to traditional res judicata principles: "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." 383 U.S. at 723, quoting *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 321 (1927). *Gibbs'* definition of "cause of action" therefore supports petitioners' contention (*see* Pet. 13-14) that where overlapping facts show the violation of different rights, and where judicial remedies for these violations can be obtained only through the exclusive jurisdictions of different courts, neither res judicata nor Section 1500 bars the prosecution of separate actions. *See, e.g., Allied Materials & Equipment Co. v. United States*, 210 Ct. Cl. 714, 715-16 (1976).

3. The government further departs from the Federal Circuit's analysis by relying on factors that the court of appeals expressly disclaimed. For example, the government attempts to buttress its "same controversy" argument with frequent references to what it calls "the *Newport News* cases" (Br. in Opp. 18-19), which were third-party actions filed by petitioners in connection with individual asbestos-related cases in the Eastern District of Virginia.[3] But the Federal Circuit held: "It is not necessary to the disposition of this case to discuss whether the Eastern District of Virginia's third-party complaints also contain 'claims for or in respect to' claims in the Claims

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[2] Petitioners, of course, cannot "try [all claims] in one judicial proceeding." *See* Pet. 14-15.

3/ As recognized by the government (Br. in Opp. 5 n.5), those third-party actions were judicially stayed by the United States Bankruptcy Court for the Southern District of New York prior to petitioners' filing their Claims Court actions. The individual cases have since been subsumed within the Manville Trust Facility as a result of the reorganization of Manville Corporation under the Bankruptcy Act.

Court cases." Pet. App. 23a n.16. The additional information upon which the government relies, therefore, played no role in the court of appeals' analysis.

4. The government's newfangled interpretation of Section 1500 would encourage and promote just the sort of jurisdictional gamesmanship Congress was trying to prevent. Consider the consequences of the government's suggestion that petitioners could simply dismiss the *Robinson* case long after the *WWII* case was filed in the Claims Court, and thus confer on the Claims Court the jurisdiction it allegedly lacked when the *WWII* case commenced. *See* Br. in Opp. 22 n.23. If that were permitted, claimants against the government would have an incentive to file separate claims in the district court and the Claims Court, to litigate them on parallel tracks, and then to make a belated tactical decision to dismiss the case that seemed less likely to succeed. That scenario—which the government appears to endorse—runs counter to the orderliness Congress sought to promote through Section 1500.

5. The final proof that the manner in which petitioners' claims proceeded is consistent with the statutory purpose is the absence of inconvenience to the government. The government does not argue that the pendency of the *Robinson* case—in which all proceedings were judicially stayed (*see* Pet. 5)—has posed the slightest burden on the test-case litigation in the Claims Court. Indeed, the government was perfectly content to have all of petitioners' claims pending simultaneously for almost four years after the Claims Court litigation began. *See* Pet. App. 36a-37a.

In fact, and contrary to the implications in the government's brief, these cases have been handled as "test cases" in an efficient and orderly manner, with close cooperation between the parties and the courts aiming toward the most expeditious disposition of all claims. Far from the "litigation-splitting" the government suddenly purports to have discovered (Br. in Opp. 19), peti-

tioners have assiduously followed a "test case" procedure to minimize the cost and expense to the parties and to minimize the demand on judicial resources. A principal efficiency of "test case" litigation is the determination of issues that would have preclusive effect in other cases where the applicable standards for invoking the various preclusion and estoppel doctrines are met.[4] In place of the efficiency and mutual cooperation that would be fostered under the correct view of Section 1500 advanced by petitioners, the government's jurisdictional gamesmanship would foster chaos and prejudice plaintiffs with meritorious claims.

The government's reluctance to support the decision of the Federal Circuit on its stated terms magnifies the uncertainty presently engulfing Section 1500 and emphasizes the need for this Court's review.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari be granted.

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[4] As a point of information, we note that a petition for a writ of certiorari was recently filed in a case raising substantive issues of the government's liability for asbestos-related injuries. *See Eagle Picher Industries, Inc. v. United States*, No. 88-1382 (filed February 21, 1989).